

August 2012, No. 26

Arizona Judicial Ethics Bulletin

Membership Updates

Commission on Judicial Conduct

The following is a list of the current members of the commission, including two new public members appointed earlier this year, beginning with the commission officers: Judge **Louis Frank Dominguez**, Chair (Municipal Court, Phoenix); Judge **Lawrence F. Winthrop**, Vice-Chair (Court of Appeals, Div. 1, Phoenix); **Colleen E. Concannon**, Secretary (public member, Tucson); Judge **Peter J. Eckerstrom** (Court of Appeals, Div. 2, Tucson); Judge **George H. Foster, Jr.** (Superior Court, Phoenix); Judge **Sherry L. Geisler** (Justice of the Peace, Springerville); Judge **Michael O. Miller** (Superior Court, Tucson); **Catherine M. Stewart** (attorney member, Tucson); and **J. Tyrrell Taber** (attorney member, Phoenix); **Rick G. Medina** (new public member, Phoenix); and **Roger D. Barton** (new public member, Prescott Valley).

Judicial Ethics Advisory Committee

The following is a list of the current members of the Judicial Ethics Advisory Committee: Judge **Timothy B. Dickerson** (Justice of the Peace, Sierra Vista); Judge **Margaret H. Downie**, Chair (Court of Appeals, Div. 1, Phoenix); Judge **Karl C. Eppich** (Municipal Court, Mesa); Judge **Virginia C. Kelly** (Court of Appeals, Div. 2, Tucson); Judge **Joseph C. Kreamer** (Superior Court, Phoenix); Judge **Charles V. Harrington** (Superior Court, Tucson); Judge **Mark R. Moran** (Superior Court, Flagstaff); **Walter B. Nash, III** (attorney member, Tucson); and **David Withey** (attorney member, AOC, Phoenix).

Summary of Disposition of Complaints in 2011

In 2011, the Commission on Judicial Conduct received 315 complaints. It dismissed 257 complaints during the year, 25 with confidential advisory comments and 9 with private warnings reminding judges of ethical obligations or recommending changes in behavior or procedures. The commission imposed 7 public reprimands and filed 2 recommendations for public censure with the Arizona Supreme Court during the year. The first formal case involved a justice of the peace who repeatedly abused his power to hold individuals in contempt of court. The court censured that judge. The second formal case involved a municipal court judge who engaged in sexual harassment of one defense attorney and in a consensual sexual relationship with another attorney who regularly appeared before him. The municipal court judge resigned and was censured pursuant to an agreement, which acknowledged that his misconduct would otherwise have warranted removal. The Supreme Court censured the judge and also suspended him from the practice of law for two years. The full text of the stipulated agreements to accept censures in both cases can be viewed on the commission's website at www.azcourts.gov/ethics by selecting Commission on Judicial Conduct, Judicial Complaints, 2010-275 and 2010-286.

Recent Formal Advisory Ethics Opinions

The Judicial Ethics Advisory Committee has three formal advisory ethics opinions since the last edition of this Bulletin. These three opinions are briefly summarized here. The full text of the opinions may be accessed at www.azcourts.gov/ethics by selecting Judicial Ethics Advisory Opinions, the year, and the specific opinion.

Opinion 11-01 – Facilitation of Donations of Arbitration Fees by Court to Law-Related Organizations (October 12, 2011)

It is ethically permissible for the Superior Court to facilitate the donation of arbitration fees to law-related organizations that request to be listed as candidates for such donations.

Opinion 12-01 – Volunteer Hearings Officers – Ability to Serve in Light of Interests in Companies with Cases Pending in Their Courts (April 19, 2012)

Individuals who privately own or work for collection companies that have cases pending in justice court cannot serve as volunteer hearings officers in other types of cases. If and when individuals are no longer involved with companies that regularly appear in the courts in which they desire to serve, they can again be considered for such service.

Opinion 12-02 – Pro Tem Part-Time Judge – Need to Resign to Run for Non-Judicial Elective Office; Use of Photos as Judge in Campaign for Non-Judicial Office (June 21, 2012)

A pro tempore part-time judge need not resign before seeking non-judicial elective office (in this instance, the position of county attorney) under the Code of Judicial Conduct. It is beyond the scope of the Judicial Ethics Advisory Committee's jurisdiction to address whether any other legal authorities might require resignation under these circumstances. A pro tempore part-time judge would abuse the prestige of judicial office by using photographs in a non-judicial campaign depicting him or herself in a judicial robe or sitting on the bench.

Judges, judicial candidates, and judicial employees may seek advice from the Judicial Ethics Advisory Committee regarding their prospective conduct under the *Code of Judicial Conduct* or the *Code of Conduct for Judicial Employees*. Questions should be sent to George Riemer, Staff Director of the JEAC. He can be reached at 602-452-3202 or by e-

mail at griemer@courts.az.gov.

Ethics Presentations

Commission representatives, including the executive director and disciplinary counsel, have made a number of presentations in the recent past to a variety of groups on the commission's procedures, the *Code of Judicial Conduct*, the *Code of Conduct for Judicial Employees*, causes of frequent complaints, and strategies to avoid complaints, including:

- Limited Jurisdiction New Judges Training through the Arizona Judicial Training Center on April 27, 2012 (commission chair and executive director).
- Arizona Magistrates Association on May 7, 2012 (executive director).
- Phoenix Municipal Court on May 15, 2012 (commission chair and executive director).
- Ethics presentation to civil traffic hearing officers through the Arizona Judicial Training Center on May 24, 2012 (executive director and disciplinary counsel).
- Presentation to Pima County Superior Court Judicial Assistants on June 20, 2012 (executive director).
- Judicial Elections – Do's and Don'ts at the Arizona Judicial Conference on June 21, 2012 (executive director and panel consisting of Justice Brutinel, Judges Jones, O'Neil, and Stauffer, and Peter Dunn with the Arizona Judges Association).

- Judicial Ethics Program for Maricopa County Justices of the Peace and Hearings Officers on July 19, 2012 (executive director and disciplinary counsel).

Requests for future presentations by commission members, staff, and members of the Judicial Ethics Advisory Committee can be submitted by e-mail to griemer@courts.az.gov.

White Paper

The following is a “white paper” intended to assist judges in promptly and properly addressing questions concerning their disqualification for cause. Feedback on the paper is welcomed as are topic suggestions for future white papers. Comments and suggestions can be submitted by e-mail to griemer@courts.az.gov.

A Primer¹ on Judicial Disqualification for Cause in Arizona

George A. Riemer
Executive Director, Arizona Commission on Judicial Conduct

Introduction

This article is intended to provide an overview of the rules applicable to judicial disqualification for cause in Arizona. The overarching standard for the disqualification of Arizona judges for cause is contained in Rule 2.11 of the Arizona Code of Judicial Conduct (ACJC). State law and other court rules contain similar, but not identical, standards and specify the procedures for litigants to seek to disqualify Arizona judges

¹ This article is not intended to be encyclopedic in its coverage of the topic of judicial disqualification for cause in Arizona. While reasonable efforts have been made to mention all relevant case law, should a reader be aware of a case that is not cited and should be, the author would appreciate hearing from the reader. He can be reached at griemer@courts.az.gov. This article may be updated from time to time to capture missing or new case law on this topic.

for cause. ⁱ These separate standards serve purposes somewhat different from those underpinning Rule 2.11. ⁱⁱ It is hoped this primer will assist judges in promptly dealing with and properly resolving disqualification issues.

Disqualification for Cause under the Arizona Code of Judicial Conduct (ACJC)

Rule 2.11 of the ACJC states the ethical standard that Arizona judges must comply with to avoid potential judicial discipline. Rule 2.11(A) provides, in part, that “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” While not limited to the following circumstances, a judge’s impartiality can reasonably be questioned under the rule for the following reasons:

1. The judge has a personal bias or prejudice ⁱⁱⁱ concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding. (Rule 2.11(A)(1))
2. The judge knows that the judge, the judge’s spouse or domestic partner, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
 - a. A party to the proceeding ^{iv}, or an officer, director, general partner, managing member, or trustee of a party;
 - b. Acting as a lawyer in the proceeding;
 - c. A person who has more than a de minimis interest that could be substantially affected by the proceeding;
 - d. Likely to be a material witness in the proceeding. (Rule 2.11(A)(2))

3. The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest, as defined by the code or Arizona law, in the subject matter in controversy or in a party to the proceeding. (Rule 2.11(A)(3))^v
4. The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous four years made aggregate contributions to the judge's campaign in an amount that is greater than the amounts permitted pursuant to A.R.S. § 16-905. (Rule 2.11(A)(4))
5. The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy. (Rule 2.11(A)(5))
6. The judge:
 - a. served as a lawyer in the matter in controversy, or was associated with a lawyer in the preceding four years who participated substantially as a lawyer in the matter during such association;
 - b. served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in

such capacity an opinion concerning the merits of the particular matter in controversy;

c. was a material witness concerning the matter; or

d. previously presided as a judge over the matter in another court.

(Rule 2.11(A)(6))

Disqualification for Cause under State Law and Civil and Criminal Procedural Rules

Arizona Rule of Civil Procedure 42(f)(2) and Arizona Rule of Criminal Procedure 10.1 set the standards and procedure for challenging state court judges for cause in civil and criminal cases.

Ariz. R. Civ. P. 42(f)(2)(A) provides that “Grounds for proceeding based upon cause are stated in A.R.S. § 12-1409 and proceedings under that statute shall be governed by this rule.” A.R.S. § 12-409(B) provides as follows:

B. Grounds which may be alleged as provided in subsection A for change of judge are:

1. That the judge has been engaged as counsel in the action prior to appointment or election as judge. [See ACJC Rule 2.11(A)(6) for a different statement of this ground]
2. That the judge is otherwise interested in the action. [See ACJC Rules 2.11(A)(2) and (3) for a different statement of this ground]

3. That the judge is of kin or related to either party to the action. [See ACJC Rules 2.11(A)(2) and (3) for a different statement of this ground]
4. That the judge is a material witness in the action. [See ACJC Rules 2.11(A)(1) and 2.11(A)(2)(d) for a different statement of this ground]
5. That the party filing the affidavit has cause to believe and does believe that on account of bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial. [See ACJC Rule 2.11(A)(1) for a different statement of this ground]

Ariz. R. Crim. P. 10.1 merely provides that “the state or any defendant shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge.” The rule does not contain definitions of the words “interest” or “prejudice”.

Multiple Standards for the Disqualification of Judges for Cause

Ethical Standards

A number of Arizona cases have dealt with motions to disqualify judges for cause under the ethics rules judges must follow. ^{vi}

A judge was challenged for cause based on the ACJC in *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). Defense counsel raised the issue that the judge should have disqualified himself from presiding over a resentencing hearing because he met with the victim’s brother in chambers prior to the hearing. The Arizona Supreme Court, citing former Canon 3(A)(4) of the ABA Model Code of Judicial Conduct prohibiting ex parte communications concerning a pending or impending case and former Canon 2

mandating that a judge should avoid even the appearance of impropriety in all of his activities, set the defendant's sentence aside and remanded the case for resentencing before another judge. ^{vii} An additional basis for the court's decision was the violation of a statute that required aggravating circumstances to be proven under the rules of evidence in criminal trials.

Another case that recognized a litigant's right to move to disqualify a judge on the basis of an alleged violation of the ACJC is *State v. Smith*, 203 Ariz. 75, 50 P.3d 825 (2002). Defense counsel raised the issue of the disqualification of the judge prior to sentencing because the victim's son and daughter-in-law were long-time county employees of the superior court and the judge had some professional contact with them in the past. The Arizona Supreme Court rejected a motion for change of judge under Ariz. R. Crim. P. 10.1(b) because it was untimely. The defendant then argued that the motion to disqualify the judge was based on an ethical conflict "to which objection cannot be waived", citing *State v. Valencia*, *supra*.

The Arizona Supreme Court appeared to be of the view that the defendant had failed to raise the issue of disqualification under the ACJC directly, but nevertheless analyzed the alleged ethical conflict under the Code. The court stated that Smith made no allegation or showing that the judge had any bias and therefore was not required to disqualify himself on that ground. The court considered the general standard to be whether an objective disinterested observer, fully informed of the facts underlying the grounds on which disqualification was contemplated, would entertain a significant doubt that justice would be done in the case. "We conclude that Judge Nelson's limited professional relationships with the victim's son and daughter-in-law were sufficiently attenuated that an informed, disinterested observer would not entertain significant

doubt that justice would be done in Smith's sentencing. Prior decisions and judicial ethics opinions support that conclusion." 50 P.3d at 829. The court concluded that the ACJC did not require Judge Nelson's disqualification.

The Arizona Supreme Court made a similar reference to the ACJC in *State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, cert. den., 549 U.S. 1000, 127 S.Ct. 506, 166 L.Ed.2d 377 (2006). The court stated, in footnote 5, as follow:

Independent of Rule 10.1, under the Judicial Code of Conduct, a judge ethically must avoid impropriety and the appearance of impropriety, Ariz. R. Sup. Ct. 81, Canon 2(A), cmt. A judge must disqualify himself if his "impartiality might reasonably be questioned" for reasons such as "personal bias or prejudice." Id. Canon 3(E)(1)(a). Ellison has not, however, relied on the Code of Judicial Conduct in arguing for Judge Moon's disqualification. Still, we note that, as a matter of ethics, a judge presiding over a codefendant's trial does not automatically raise a reasonable question of impartiality. *State v. Thompson*, 150 Ariz. 554, 556-57, 724 P.2d 1223, 1225-26 (App. 1986)(citing Canon 3). Here, Judge Moon's statements do not suggest that his impartiality could reasonably be questioned as an ethical matter.

Other cases considering judicial disqualification for cause under the ACJC include,

State v. Salazar, 182 Ariz. 604, 898 P.2d 982 (App. 1995)(judge abused her discretion in denying motion to disqualify trial judge based on the appearance of partiality under Canon 2 of the Arizona Code of Judicial Conduct; defense counsel represented the trial judge's former secretary in a wrongful termination lawsuit against the judge; the

defendant did not waive the argument by not filing a special action before the trial; the failure to disqualify the trial judge justified the reversal of the defendant's conviction.);

State v. Carver, 180 Ariz. 167, 173, 771 P.2d 1382, 1388 (1989)("Ex parte communication [in violation of former Canon 3 of the ACJC] will not necessarily require recusal.")(citation omitted);

State v. Emanuel, 159 Ariz. 464, 468, 768 P.2d 196, 201 (1989)("While appellee's Rule 10.1 argument is factually correct, we are of the opinion that "waiver" is not a viable claim or defense where a violation of Judicial Canon 3(C) is raised prior to actual sentencing.");

State ex rel Corbin v. Superior Court, 155 Ariz. 560, 748 P.2d 1184, 1186 (1987)("We hold . . . that under Canon 3(C)(1), the impartiality of the judge may reasonably be questioned when adversarial proceedings in a criminal case are assigned to a judge who was a member of the staff of the prosecuting attorney at the time prosecution commenced. In such situations, the judge to whom the case is assigned should recuse himself and take appropriate steps to have the case assigned to another judge. Of course, the same rule applies in reverse, when a case is assigned to a judge who was a member of the staff of the office which had defended the case.");

State v. Mincey, 141 Ariz. 425, 687 P.2d 1180 (1984)(alleged violations of the Code of Judicial Conduct (ex parte communication and public statements) did not require trial judge's disqualification from ruling on motion for new trial or involvement in sentencing of the defendant);

State v. Leslie, 136 Ariz. 463, 666 P.2d 1072 (1983)(trial judge, after soliciting contact with relatives of the victim, disqualified himself from handling defendant's sentencing; granting of new trial was affirmed on appeal because a statute required the trial judge to conduct the sentencing hearing);

Kay S. v. Mark S., 213 Ariz. 373, 142 P.3d 249 (App. 2006)(Presiding judge should have granted mother's motion to disqualify family law judge for cause based on appearance of partiality; the father's lawyer served as a pro tempore judge in the family law judge's court at times when that judge was ruling on motions in which the lawyer represented the father. "Mother is entitled to have a judge whose impartiality is not subject to question exercise independent judgment in arriving at the determinations of which she complains unless we can determine on appeal that the challenged decisions would have been substantially the same if made by a judge whose impartiality was not reasonably subject to question. We cannot do so here.").

Smith v. Smith, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977)(citing Canon 29 of the former Arizona Canons of Judicial Ethics for the proposition that, "normally, a judge should not sit on litigation involving a party who is a party to other litigation in which the judge himself is a litigant.").^{viii}

Due Process and Fairness-Based Standards

As noted by Justice Anthony Kennedy for the majority in *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L.Ed.2d 1208 (2009), "It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." (citation omitted) The standards and procedures Arizona has expressed in state law and its civil and criminal procedural rules for the disqualification of judges for cause is an

expression of this concept and, more broadly, state policy that citizens deserve fair trials before fair judges. ^{ix} Judges should not be involved in proceedings in certain circumstances to ensure litigants have a fair trial before a fair tribunal. A trial judge is, however, presumed to be free from bias and prejudice. The party seeking a judge's disqualification for cause has the burden of establishing bias or prejudice ^x by a preponderance of the evidence. *State v. Ellison*, 213 Ariz. 116, 128, 140 P.3d 899, 911, cert. den., 549 U.S. 1000, 127 S. Ct. 506, 166 L.Ed.2d 377 (2006); *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1388 (1989). Extreme circumstances of judicial bias or prejudice may lead to a finding of a violation of a litigant's constitutional right to due process of law. As the U.S. Supreme Court noted in *Caperton*, the probability of actual bias may be too high in unique circumstances to be constitutionally tolerable. States may adopt disqualification standards that are more rigorous than due process requires. Again, the essential goal of such standards and procedures is to ensure the litigants have a fair trial before a fair tribunal.

As previously noted, Arizona has adopted a statutory standard for disqualification for cause in civil cases, a rule of procedure to govern how challenges for cause in civil cases are to be considered, and a separate standard and process for disqualification for cause in criminal cases. A number of cases have dealt with whether these standards have been violated.

An allegation that a judge should be disqualified for cause under Ariz. R. Civ. P. 42(f)(2)(a) because of prior legal rulings in similar cases was deemed insufficient as a matter of law in *Mervyn's v. Maricopa County Superior Court*, 179 Ariz. 359, 362, 879 P.2d 367, 370 (1994)(". . . a judge's legitimate judicial rulings in other cases clearly cannot be a basis for a party's claim of bias and prejudice.")(citation omitted)). The *Mervyn's* court

held that the presiding judge had no reason or duty to hold a hearing on the motion to disqualify the challenged judge for cause as the alleged bias and prejudice did not come from an extrajudicial source.^{xi}

Other cases considering judicial disqualification for cause under Arizona's disqualification statute and rules include,

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, cert. den., 549 U.S. 1000, 127 S.Ct. 506, 166 L.Ed.2d 377 (2006)(no per se disqualification based on judge presiding over a codefendant's trial; "There also is no bias or prejudice inherent in presiding over a defendant's subsequent proceeding, even though the judge has heard unfavorable remarks about the defendant in prior proceedings, particularly when the judge states he will keep an open mind.");

Costa v. Mackey, 227 Ariz. 565, 261 P.3d 449 (App. 2011)(litigant did not meet his burden of proof in alleging a judge was biased or prejudiced solely based on the judge's erroneous order setting an excessive amount of bail);

State v. Curry, 187 Ariz. 623, 931 P.2d 1133 (App. 1996)(disagreements over rulings are insufficient to support recusal);

Smith v. Smith, 115 Ariz. 299, 564 P.2d 1266 (App. 1977)(that a litigant had a pending suit against the judge arising out of the case the judge was handling involving the litigant was not within the statutory grounds for disqualification for cause set forth in A.R.S. § 12-409(B)).^{xii}

Staying out of Trouble

Judges, to be sure, are motivated to apply the highest standard in deciding issues concerning their disqualification for cause. Violating the ACJC exposes a judge to judicial discipline. ^{xiii}

The ACJC “establishes standards for the ethical conduct of judges and judicial candidates.” *Preamble, Arizona Code of Judicial Conduct*. The Scope section of the Code provides, in part, that “The canons state overarching principles of judicial ethics that all judges must observe.” And that “The rules in the code are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances.” Notwithstanding the foregoing, “The code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.” *Scope, Arizona Code of Judicial Conduct*.

The Arizona Supreme Court has explained the purpose of judicial discipline as follows:

We do not lightly undertake the difficult task of disciplining lawyers and judges. Our goal is not to punish but, rather, to impose sanctions to protect the public and foster judicial integrity. Imposition of proper and proportionate sanctions serves dual purposes. It deters similar conduct by others and as a result, fosters public confidence in our self-policing system. Only in this way can we ensure judicial integrity and preserve judicial independence. We therefore must examine Respondent’s conduct

in light of its harm to the public and its impact on the perceived integrity of the judicial system.

In re Peck, 177 Ariz. 283, 287, 867 P.2d 853, 857 (1994); *see also In re Haddad*, 128 Ariz. 490, 492, 627 P.2d 221, 223 (1981) (“The purpose of judicial discipline is not to punish the individual judge, but to maintain the high standards of the judiciary and the proper administration of justice.”) (citations omitted).

While the California Code of Judicial Conduct generally limits disqualification for cause to those grounds set forth by statute,^{xiv} motions to disqualify Arizona judges can be based on either the ACJC, state law, or both.

To the extent having multiple standards has caused or could cause confusion or inconsistency in the resolution of issues of disqualification for cause, several alternative approaches could be considered. To the extent A.R.S. § 12-409(B) serves purposes beyond those served by Rule 2.11 of the ACJC, Ariz. R. Crim. P. 10.1 could be revised to make it clear that the standards for disqualification in A.R.S. § 12-409(B) are the same standards as apply to motions to disqualify judges for cause in criminal cases. Another approach could be to amend the statute and Ariz. R. Crim. P. 10.1 to state that the grounds for disqualification for cause are as set forth in the disqualification provisions of the ACJC (*i.e.*, Rule 2.11).^{xv} The essential standard for disqualification for cause would then be when a judge’s impartiality might reasonably be questioned. This would standardize under one rule the criteria for the disqualification of a judge for cause.

Conclusion

Arizona judges must analysis both Rule 2.11 of the ACJC and the applicable statute and court rules in deciding whether to disqualify themselves for cause. Even without a motion by a litigant, judges must ensure they are not participating in a case in violation of the ACJC. It may be worthwhile to study whether the disqualification for cause standard should be stated but once through the ACJC with the statute and other court rules applying that same standard. In the meantime, judges are reminded that there are multiple grounds for moving their disqualification for cause and that those multiple grounds may have different policy underpinnings.

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The *Arizona Judicial Ethics Bulletin* is published periodically by the Arizona Commission on Judicial Conduct and the Judicial Ethics Advisory Committee as a service to the Arizona Judiciary. For more information, contact the the editor at 1501 W. Washington Street, Suite 229, Phoenix, Arizona 85007, or call 602-452-3200.

Endnotes

ⁱ This article does not address the procedural requirements for motions to disqualify for cause. See, e.g., *State v. Smith*, 203 Ariz. 75, 50 P.3d 825, 829 (2002) (“ . . . Smith failed to timely file his Rule 10.1 motion.”); *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996) (“ . . . defense counsel moved for recusal during trial, and the court instructed him to file a motion for change of judge for cause. The trial judge’s instruction was correct since a party moving for change of a judge must support the motion with an affidavit setting forth specific grounds.”) (citations omitted)); *Smith v. Smith*, 115 Ariz. 299, 302, 564 P.2d 1266, 1269 (App. 1977) (“Since the husband has failed to supply this court with a transcript of the hearing before Judge Broomfield on the second affidavit of bias and prejudice, we must assume that the evidence presented at that hearing supports Judge Broomfield’s denial of the removal of Judge Heineman.”) (citation omitted)); *Potthast v. Cordon*, No. 1 CA-CV-07-0007 (Division One 2008) (motion to disqualify judge for cause under Ariz. R. Civ. P 42(f)(2) did not include required affidavit. “Accordingly, because Wife’s motion in this case did not meet the minimum statutory requirements, the court did not err in issuing its second decree prior to a ruling being issued by the presiding family court judge.”). Nor is the issue addressed whether parties have discovery rights in connection with motions to disqualify judges for cause. See, e.g., *State ex rel Corbin v. Superior Court*, 155 Ariz. 560, 748 P.2d 1184 (1987); *State v. Rossi*, 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987):

Appellant never filed a motion pursuant to Rule 10.1, nor in his motion to voir dire the trial judge does he ever allege that the trial judge acted improperly. Appellant believes, however, that the trial judge may have been prejudiced or biased for numerous reasons. Without ever directly saying so, appellant seems to believe that the mere possibility of prejudice or bias provides him with a constitutional right to voir dire the trial judge.

We decline to hold that such a right exists for several reasons. First, we have not been cited to any case law, nor has our research revealed any authority, suggesting such a right exists. Second, removal procedures of Rule 10.1 adequately safeguard a party's constitutional right to a fair trial before an impartial judge, and these procedures would be rendered meaningless and effectively circumvented if permission to question a judge's partiality rested not on concrete facts and specific allegations but on mere speculation, suspicion, apprehension, or imagination. And third, and perhaps most importantly, permitting voir dire of a trial judge on every occasion that the possibility of prejudice or bias could arise within the course of a criminal case would not only effectively emasculate the presumption of impartiality bestowed on the judiciary but also subject the dignity, integrity, and orderly function of the judicial system to repeated frivolous attacks and unwarranted disrepute.

In addition, this article does not address notices of peremptory change of judge pursuant to Ariz. R. Civ. P. 42(f)(2) and Ariz. R. Crim. P. 10.2. *See, e.g., Nordstrom v. Leonardo*, 214 Ariz. 545, 155 P.3d 1069 (App. 2007); *Brush Wellman, Inc. v. Lee*, 196 Ariz. 344, 996 P.2d 1248 (App. 2000); *Hill v. Yuma County*, 980 P.2d 967 (App. 1999); *Kelliher v. Arizona Department of Economic Security*, 171 Ariz. 228, 829 P.2d 1274 (App. 1992); *Guberman v. Cohen*, 19 Ariz. App. 590, 509 P.2d 721 (1973); and *Hofstra v. Mahoney*, 18 Ariz. App. 4, 499 P.2d 735 (1972). *See also State v. Gordon*, 1 CA-SA 06-0116 (Division One 2006(If a party exercises the right to a peremptory change of judge before appealing, Ariz. R. Crim. P. 10.4(b) does not renew that right after appeal and remand)).

Nor is Ariz. R. Crim. P. 17.4(g)(automatic change of judge if a plea is withdrawn after submission of a presentence report) covered. *See, e.g., Reed v. Burke*, 1 CA-SA 08-0237 (Division One 2008)("It is well established that the denial of a request for a change of judge is appropriate for special action review"; the ten-day deadline of Ariz. R. Crim. P. 10.2(c) applies once the triggering event in Rule 17.4(g) has occurred).

A separate statute, A.R.S. 22-204, governs peremptory changes of justices of the peace. It provides as follows:

Change of venue

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- A. If a party to an action before a justice of the peace makes an affidavit supported by the affidavit of two other credible persons of the county that they have good reason to believe, and do believe, that the party cannot have a fair and impartial trial before the justice, or in such justice's precinct, the justice shall at once request the justice of the peace of some other precinct within the county to conduct the trial within the precinct where the action is pending, and hear all matters involved therein, or to transfer the action to the nearest justice of the peace within the county not subject to the same or some other disqualification. Only one such change of venue may be had.
- B. The venue may also be changed to another justice of the peace of the county upon written consent of the parties filed in the action.

The procedure for transferring a case to another justice of the peace is set forth in A.R.S. 22-205.

Particular municipal courts may also have their own rules on preemptory requests to change judge. *See, e.g.*, Phoenix Municipal Code § 2-86 and local rules 1.7-1.12.

ⁱⁱ While Arizona's statutory and procedural rule scheme concerning motions to disqualify judges for cause has an essential purpose separate and apart from that of the Arizona Code of Judicial Conduct, their goals are not unrelated and, as noted in this article, in many respects overlap. The California Supreme Court in *People v. Freeman*, 47 Cal. 4th 993, 1000-1001, 103 Cal. Rptr. 723, 222 P.3d 177 (2010) explained the purposes of California's statutory disqualification scheme as follows: "The operation of the *due process clause* in the realm of judicial impartiality, then, is primarily to protect the individual's right to a fair trial. In contrast to this elemental goal, a statutory disqualification scheme, like that found in our Code of Civil Procedure, is not *solely* concerned with the rights of the parties before the court but is also "intended to ensure public confidence in the judiciary." (citation and footnote omitted). Thus, an explicit ground for judicial disqualification in California's statutory scheme is a public perception of partiality, that is, the appearance of bias. (citations omitted)." The court noted in a footnote [3] that, "Of course, the two goals are not unrelated and the due process guarantee of an impartial adjudicator would necessarily install public confidence in the judicial system."

ⁱⁱⁱ *See Scheehle v. Justices of the Supreme Court*, 120 P.3d 1092 (Ariz. 2005)(rejecting claim that four justices of the supreme court were biased or prejudiced against the plaintiff based on the defense of prior, related, litigation; "As a matter of law, even if Mr. Scheehle could establish that any of the justices has a view on the question at issue, such an allegation does not constitute the kind of bias or prejudice required for disqualification under the canon [Former Canon 3(E)(1)(a)].").

^{iv} See *Scheehle v. Justices of the Supreme Court*, 120 P.3d 1092 (Ariz. 2005)(rejecting claim that the justices of the supreme court were disqualified because they were named as parties; “. . . we agree that the rule of necessity obliges us to sit in answering the questions certified in this case even though we are nominal parties to the action.”).

^v See *Arizona Public Service Co. v. Long*, 160 Ariz. 429, 773 P.2d 988 (1989)(Appendix)(recusal based on financial interest in party to proceedings).

^{vi} The Arizona cases cited in the text support the argument that alleged violations of the Arizona Code of Judicial Conduct are an independent basis to move to disqualify a judge for cause. However, they are less forceful in the establishment of such a right than the Nevada Supreme Court’s pronouncement in *Towbin Dodge, LLC v. Eighth Judicial District Court*, 112 P.3d 1063 (Nev. 2005), as follows: “We held in *PETA [PETA v. Bobby Berosini, Ltd.]*, 111 Nev. 431, 894 P.2d 337 (1995)] that the Nevada Code of Judicial Conduct (NCJC) sets forth not only ethical requirements for judges, but can also provide a substantive basis for judicial disqualification.” The court went on to allow a party to file a motion to disqualify based on NCJC Canon 3E [Disqualification] if new grounds for a judge’s disqualification are discovered after the time to file such a motion under Nevada’s disqualification statute has passed. The motion must be filed as soon as possible after the party becomes aware of the new information and it must set forth facts and reasons sufficient to cause a reasonable person to question the judge’s impartiality. The challenged judge can contradict the motion and it must be referred to another judge to decide. See also *Ybarra v. State*, 247 P.3d 269 (Nev. 2011).

^{vii} Cf. *McElhanon v. Hing*, 151 Ariz. 403, 728 P.2d 273 (1986)(a judge’s ex parte conference with plaintiff and his counsel was improper as a matter of judicial and legal ethics, but did not warrant reversal of the judgment on the basis of the appearance of impropriety or actual prejudice). The court distinguished *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979), as follows: “Thus, unlike *State v. Valencia*, the ex parte communication did not provide the judge with new and un rebutted factual information on the very issues that he was to decide. While the conference was improper, see ante at 396, 728 P.2d at 266, we do not believe the essential fairness of the entire proceeding was left in question. No appreciable doubt was cast upon the integrity of the judicial process.” 151 Ariz. at 412, 728 P.2d at 282.

^{viii} Cf. *State v. Sasak*, 178 Ariz. 182, 871 P.2d 729 (App. 1993)(post-conviction proceeding judge did not abuse his discretion in summarily dismissing claim that the trial judge should have disqualified himself because of a prior association with several lawyers in the U.S. Attorney’s Office many years prior to the trial; trial judge had disclosed the association on the record).

^{ix} “The right to a fair trial is the foundation of our judicial system. Necessarily included in this right is the right to have the trial presided over by a judge who is completely impartial and free

of bias or prejudice.” (citation omitted). *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1388 (1989).

^x “Bias or prejudice means a hostile feeling, ill will, undue friendship, or favoritism towards one of the litigants.” (citation omitted). *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1388 (1989).

^{xi} The United States Supreme Court in *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (2004), indicated that the “extrajudicial source” doctrine, where the basis for a judge’s disqualification for cause had to arise from a source other than proceedings in the litigation in question, was not really a doctrine, but rather a factor in determining whether a judge should be disqualified pursuant to the terms of 28 U.S.C. § 455(a)(“Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”). “Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) “extrajudicial source” factor, than of an “extrajudicial source” doctrine, in recusal jurisprudence.” The Court went on to state that “. . . judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.” 510 U.S. at 555. “. . . opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source, and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” 510 U.S. at 555. “Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration – even a stern and short-tempered judge’s ordinary efforts at courtroom administration – remain immune.” 510 U.S. at 555-556.

^{xii} Cf. *Simon v. Maricopa Medical Center*, 225 Ariz. 55, 234 P.3d 623 (App. 2010)(rejecting claim that ruling should be reversed on the basis of bias due to judge’s alleged “consistent pattern of adverse rulings”. In addition, the plaintiff waived the issue of bias by failing to make a timely motion in the trial court).

See also McAllister v. Sanchez, 1 CA-CV 11-0087 (Division One 2012)(“McAllister’s affidavit [seeking to disqualify Judge Rea for cause] shows that he bases his claim of judicial bias entirely on Judge Rea’s actions or alleged inaction in the case. He does not demonstrate that Judge Rea acted towards him with ill-will or hostility arising from outside the case. The affidavit,

therefore, does not establish grounds for disqualification. Judge Gama did not abuse his discretion in denying McAllister's motion for change of judge for cause."); *Trischetti v. Trischetti*, 1 CA-CV 07-0125 (Division One 2008)(mother's request for a change of judge for cause was properly denied; all of her allegations of bias arose from the judge's participation in the case and the facts alleged did not objectively establish any personal bias. "To the extent Mother's counsel believed there was any hostility between the judge and himself, it is not apparent in the record and, in any event, does not warrant disqualification except in extreme cases, which this is not."); *In re Billy C.*, 1 CA-JV 05-0189 (Division One 2007)(failure to seek a change of judge or otherwise object to judge presiding over delinquency adjudication limited appellate court's review of claim of judicial bias only for fundamental error; "We do not discern any favoritism in this case towards Victim, nor do we view Judge Oberbilling's prior comment [in a different case] as a circumstance that would lead to the appearance of impropriety necessitating his disqualification."); *Sanchez v. Sanchez*, 1 CA-CV 05-0183 (Division One 2006)(Husband's affidavit seeking the disqualification of a judge for cause was insufficient as a matter of law; it did not allege any extra-judicial bias or bias meeting the *Liteky* standard [See Endnote xi]. Husband was not entitled to a hearing on his motion.).

^{xiii} As referenced in footnote 4, the Nevada Supreme Court has limited motions to disqualify judges for cause to alleged violations of NCJC Canon 3E (Disqualification), not every provision of the NCJC.

^{xiv} This appears to be the general approach California has taken as to motions to disqualify trial court judges for cause. Canon 3E(1) of the California Code of Judicial Ethics provides that "A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law." California Judges Association Formal Ethics Opinion 45 (January 1997) provides, in part, as follows: "Modified Canon 3E relies solely on statutory grounds for disqualification and disclosure requirements. While the new standard is neither more nor less stringent, it is arguably clearer. Every matter involving a potentially sensitive issue requires the judge to make a three-part analysis of recusal, waiver and disclosure. Judges should look to CCP 170.1 for disqualification grounds and to CCP 170.2 for areas which do not require disqualification. CCP 170.3(b) governs the process of waiving disqualification." CCP 170.1 contains seven grounds on which a litigant can move to disqualify a trial judge. The California Code of Judicial Ethics does govern issues of possible disqualification for cause based on the ownership of corporate or government bonds. *See* Canon 3E(3)("Ownership of a corporate bond issued by a party to a proceeding and having a fair market value exceeding one thousand five hundred dollars is disqualifying. Ownership of government bonds issued by a party to a proceeding is disqualifying only if the outcome of the proceeding could substantially affect the value of the judge's bond. Ownership in a mutual or common investment fund that holds bonds is not a disqualifying financial interest.").

^{xv} Connecticut has essentially taken this approach by court rule. Sections 1.22 and 1.23 of the 2011 Connecticut Practice Book provide as follows:

Sec. 1-22. Disqualification of Judicial Authority

(a) A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct or because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal. A judicial authority may not preside at the hearing of any motion attacking the validity or sufficiency of any warrant the judicial authority issued nor may the judicial authority sit in appellate review of a judgment or order originally rendered by such authority.

(b) A judicial authority is not automatically disqualified from sitting on a proceeding merely because an attorney or party to the proceeding has filed a lawsuit against the judicial authority or filed a complaint against the judicial authority with the judicial review council. When the judicial authority has been made aware of the filing of such lawsuit or complaint, he or she shall so advise the attorneys and parties to the proceeding and either disqualify himself or herself from sitting on the proceeding, conduct a hearing on the disqualification issue before deciding whether to disqualify himself or herself or refer the disqualification issue to another judicial authority for a hearing and decision.

Sec. 1-23. Motion for Disqualification of Judicial Authority

A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time.